

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLEE**

77-7043

To be argued by
JANE E. BLOOM

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

HECTOR CRUZ, MATTHEW GULLEY, CARMINE PERRELLI,
GEORGE DUNLEAVY, LOUIS POVEROMO, NICHOLAS PECHAR,
and GEORGE MITCHELL, individually and on behalf
of all other persons similarly situated,

Plaintiffs-Appellees,

-against-

BENJAMIN WARD, individually and in his capacity
as Commissioner of the New York State Department
of Correctional Services; VITO M. TERNULLO,
individually and in his capacity as Director of
Matteawan State Hospital; LAWRENCE SWEENEY,
individually and in his capacity as Chief of
Psychiatric Services at Matteawan State Hospital,

Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR PLAINTIFFS-APPELLEES

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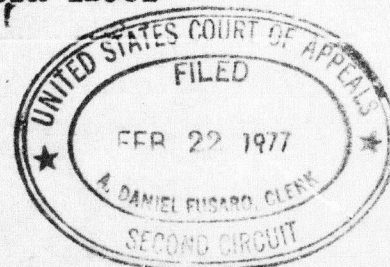


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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

HECTOR CRUZ, et al.,

Plaintiffs-Appellees,

-against-

77-7043

BENJAMIN WARD, et al.,

Defendants-Appellants.

BRIEF FOR PLAINTIFFS-APPELLEES

Questions Presented

1. Do mentally ill inmates have a right to treatment at Matteawan State Hospital pursuant to New York Correction law Article 16?
2. Do mentally ill inmates have a right to procedural due process protections before their state statutory right to treatment is terminated?
3. Do mentally ill inmates at Matteawan have a constitutional right to treatment?
4. Do mentally ill inmates have a right to procedural due process before they are transferred to prison segregation as a punitive measure?
5. Did the District Court identify appropriate minimum procedures for the transfer of mentally ill inmates to prison?
6. May mentally ill inmates be transferred to prison in retaliation against the exercise of first amendment rights?
7. Did the District Court correctly decide to rule on the issues in this case and not abstain?
8. Is the District Court decision appealable?

STATEMENT OF THE CASE

This is an appeal from an opinion and order of the United States District Court for the Southern District of New York (Goettel, J.) dated December 17, 1976. The District Court found that mentally ill inmates at Matteawan State Hospital (hereinafter Matteawan) have a right to treatment under New York law and due process protections must attach before this right is terminated and inmates are returned to prison. The District Court ordered the defendants to construct an administrative process for the return of inmates to prison. The District Court decided that this process must include at a minimum the following:

"written notification to the inmate of the transfer decision and its factual basis; identification of the decision makers; ending the use of the treatment staff as the sole decision makers; and some type of professional review which will be free from administrative pressures." (A¹ - 103)

On October 28, 1975, plaintiffs Hector Cruz, Matthew Gulley, and Carmine Perrelli filed a verified class action

¹ Page references preceded by "A" refer to the Appendix.

complaint seeking to have the District Court declare invalid and enjoin the punitive transfer of mentally ill inmates from Matteawan to prison without their consent or a prior hearing.

(A - 21) Plaintiffs Cruz and Gulley also sought a preliminary injunction ordering the defendants to release them from their confinement on the Transfer Unit at Fishkill Correctional Facility (hereinafter Fishkill) or at prison and return them to the general population at Matteawan. (A - 3)

The Honorable Dudley Bonsal issued an order to show cause on October 28, 1975 for plaintiffs' motion for a preliminary injunction and motion to proceed as a class², and heard oral argument on these motions on November 3, 1975. On November 11, 1975, defendant Dr. Lawrence Sweeney submitted an affidavit in opposition to plaintiffs' application for a preliminary injunction.

On December 15, 1975, plaintiffs moved to intervene George Dunleavy, Louis Poveromo, Nicholas Pechar, and George Mitchell as named party plaintiffs (A - 46) and on December 15, 1975 this motion was granted. On November 28, 1975, the Honorable Dudley Bonsal referred the hearing on the motion for a

² The District Court has not yet decided plaintiffs' motion to proceed as a class.

preliminary injunction to United States Magistrate Gerard L. Goettel. An evidentiary hearing was held on December 30, 1975, January 27, 1976, March 8, 1976, and March 10, 1976. In April 1976, this case was transferred to the Honorable Gerard L. Goettel. On or about May 6, 1976, defendants filed a motion to dismiss the complaint.

In an opinion and order dated December 17, 1976, the District Court declared defendants' practices of returning plaintiffs to prison with no procedural protections violative of the due process clause of the Fourteenth Amendment to the United States Constitution and ordered defendants to construct administrative procedures in keeping with the fundamentals of the due process clause within sixty days. On January 11, 1977, defendants moved for a stay pending appeal. On January 13, 1977, defendants filed a notice of appeal. On January 17, 1977, plaintiffs submitted affidavits in opposition to the motion to stay and oral argument on defendants' motion for a stay was heard before the District Court.

On January 27, 1977 the District Court granted defendants' motion for a stay pending appeal on the condition that the appeal be expedited and that defendants submit an administrative procedure within two weeks of a favorable decision by this Court. The

District Court also certified the case to this Court. On February 2, 1977, defendants filed a notice of motion for leave to appeal pursuant to 28 U.S.C. 1292(b).

STATEMENT OF FACTS

A. Introduction

The District Court found that all plaintiffs were initially transferred from New York State prisons to Matteawan after they were determined to be mentally ill persons in need of treatment pursuant to N.Y. Correction Law §408 (McKinney 1977, amending McKinney 1968). The procedures governing the transfer from prison to Matteawan as set forth in N.Y. Correction Law §408 provide for extensive procedural protections in the form of notice, psychiatric review, judicial hearing, and representation.

In the course of the four day hearing, plaintiffs Cruz, Gulley, Dunleavy, Poveromo, and Mitchell testified regarding defendants' procedures utilized to transfer them from prison to Matteawan and to return them to prison pursuant to N.Y. Correction Law §410 (McKinney 1968). Martin Ogulnick, a psychologist at Matteawan, also testified for the plaintiffs. Defendants' witnesses included Dr. Lawrence Sweeney, Dr. Ali Sirman, Dr. VicArthur

Factora, Dr. Atilla Cakir, Dr. Jack Wright, and Dr. Seymour Feldman.

The cases of plaintiffs Cruz and Gulley will be examined in detail to illustrate the manner in which defendants returned plaintiffs to prison. The testimony of defendants' witnesses regarding the procedures and criteria utilized in returning patients to prison will then be examined.

B. Hector Cruz

In December 1973 Hector Cruz was admitted to the Diagnostic and Evaluation Center at Fishkill (hereinafter D & E) after he became depressed and tried to hang himself when he was placed in segregation in Attica Correctional Facility (hereinafter Attica).³ (Tr. 68, A - 78).⁴ On January 4, 1974, Cruz was admitted to Matteawan pursuant to N.Y. Correction Law §408 with a diagnosis of "Schizophrenia Residual Type". (State's Exhibit G at 3). The District Court found (A - 78) and the undisputed testimony of Cruz shows that at Matteawan he was placed on an open ward (Tr. 73), received prescriptive medication (Tr. 73), saw a psychologist twice a week for therapy (Tr. 74), and was evaluated by a psychiatrist once each month. (Tr. 74).

³ In 1961, Cruz was found guilty by verdict of the crime of first degree murder and was sentenced to death. This sentence was commuted to a life sentence. From 1962 and 1973, Cruz was incarcerated at Attica.

⁴ Page references preceded by "Tr." refer to the Transcript of the hearing.

At Matteawan Cruz was aggressive and a disciplinary problem. In May 1974, his treatment records indicated as follows:

"It appears he tends to misunderstand people and becomes physically aggressive. Patient Cruz has promised the ward charges and professionals that the next time he is involved in any physical violence he will ask for a transfer." (A - 78).

On August 27, 1974, Cruz was transferred to Clinton at his request. The District Court found that at Clinton Cruz received no medication or treatment. (A - 78, Tr. 72). The undisputed testimony indicated that at Clinton, Cruz was placed in a locked cell for twenty-four hours a day (Tr. 72). On September 12, 1974, Cruz was determined to be a mentally ill person in need of treatment pursuant to N.Y. Correction Law §408 and was transferred to D & E.

On October 30, 1974, Cruz was admitted to Matteawan with a diagnosis "residual schizophrenia with aggressive features" (State's Exhibit G at 4, A - 78). From October 30, 1974 to September 17, 1975, Cruz's treatment pattern resumed and he received a psychiatric evaluation every six to ten weeks. Cruz's disciplinary problems persisted and Dr. Factora testified that getting into fights was one of Cruz's behavior problems (Tr. 517). The District Court found that on September 17, 1975, Cruz received a psychiatric evaluation and Dr. Factora concluded as follows:

". . . judgment and insight were defective and the patient needs further hospitalization because he has poor self-control, immature and appeared to be unpredictable in his behavior." (State's Exhibit G at 8, A - 79).

The District Court found that on October 17, 1975

Cruz was involved in a fight on his ward and that three days

later he was evaluated by a panel of six psychiatrists. (A -79).

The District Court determined that "This evaluation was not a

usual hospital routine and its use in this case was not explained.

(A - 79).⁵ It was uncontroverted that Cruz was not scheduled for a regular evaluation that day by the administration. (Tr. 553, 518).

Cruz received no advance notice of the psychiatric evaluation.

Cruz testified that the evaluation lasted one or two minutes

(Tr. 78) and that he was asked the following questions:

". . . One told me, 'How do you feel,' you know, 'Do you remember that you had a fight about something happening in 6 Ward.' I said I can't remember, you know. I said I was, you know, that day I was sick, you know, and he asked me with three or four, a few questions and then walk away." (Tr. 79).

⁵ Dr. Sweeney testified that it was not usual for six doctors to do a psychiatric evaluation and that the doctors ". . . cooked that one up on their own." (Tr. 322). He further stated, ". . . I think if they felt that there was an issue here that somebody was going to contest, then certainly a consensus opinion is going to carry more weight than one isolated physician's opinion." (Tr. 322).

At the conclusion of the evaluation, Cruz was found to have recovered from his mental illness and was transferred back to prison on October 21, 1975. The District Court found that his final diagnosis was "schizophrenia, residual type." (A - 79). The psychiatric evaluation dated October 20, 1975 indicates as follows:

"Insight and judgment were inadequate. The patient was last seen for evaluation on September 17, 1975 and since then his condition remains the same. He has been functioning fairly well on the ward except at one time he was involved in an unpleasant incident. . ."
(State's Exhibit G at 9).

Cruz received no notice at the conclusion of his October 20, 1975 psychiatric evaluation that he was to be returned to prison. When Cruz testified on December 30, 1975, he was incarcerated at Fishkill and stated that he felt mentally ill and should not have been returned to prison. He testified

"I feel sick. At night time, I can't go to sleep. I feel the prayers, you know, and I didn't get no kind of medication because they don't got nobody down there, no doctor to help you." (Tr. 78).

On or about March 18, 1976, Cruz was transferred to Attica.

Cruz was later transferred to Greenhaven Correctional Facility where he is currently incarcerated.

C. Matthew Gulley

On December 1, 1973, Matthew Gulley was admitted to the D & E at Fishkill after he became depressed, hallucinated, and attempted suicide when he was placed in segregation at Attica⁶ (A - 80, Tr. 20). On January 28, 1974, Gulley was admitted to Matteawan with a diagnosis of "Borderline Mental Retardation, Reactive Psychosis Unspecified". (State's Exhibit B at 2, A - 80).

The District Court found (A - 80) and the undisputed testimony of Gulley shows that at Matteawan he was placed on an open ward (Tr. 33), received medication (Tr. 34), and was evaluated by a psychologist once each month (Tr. 46).

In January 1975, Gulley was involved in a fight (A - 80; Tr. 35-39). Dr. Feldman noted in a psychiatric evaluation dated February 11, 1975, "If his belligerent tendencies continue despite all other measures, it might be necessary to return him to a regular correctional facility." (A - 80, State's Exhibit B at 12). After this incident, Gulley was placed in a restraining sheet and then placed on the jail ward. (Tr. 37) (A - 80). On February 13 and 14, 1975, Gulley was evaluated by Dr. Lawrence Sweeney. The

⁶ In 1968, Gulley was convicted of robbery, burglary, and petty larceny and was sentenced to a term of imprisonment not to exceed ten years. From 1968 to December 1, 1973, Gulley was incarcerated at Attica.

District Court found that on February 25, 1975, Gulley was transferred to Clinton Correctional Facility (hereinafter Clinton) without notice and remained there until March 11, 1975. (A - 87). At Clinton, it is undisputed that Gulley was placed in a locked room for 24 hours a day (Tr. 42-3, State's Exhibit B at 15). As the District Court noted, "This confinement was marked by an almost complete absence of professional assistance and the total absence of medication." (A - 81). On March 11, 1975, Gulley was transferred directly from Clinton to Matteawan pursuant to N.Y. Correction Law §408. Gulley testified that his mental and physical condition deteriorated during the two weeks he was confined at Clinton. (Tr. 45).

At Matteawan, Gulley's condition of confinement and therapeutic programs were substantially the same as they had been during his previous admission to Matteawan. From March 11, 1975 to October 9, 1975, he received a psychiatric evaluation every six to eight weeks. In July 1975, an application was made pursuant to N.Y. Correction Law §408 to retain Gulley at Matteawan. Gulley indicated on July 24, 1975 that he did not want to contest the application. (State's Exhibit B at 17). Dr. Lawrence Sweeney testified that applications for retention orders were only made

if there was an indication that the patient belonged at Matteawan. (Tr. 273). He further stated that ". . . if we don't feel that we can defend the thing in court, we're not going to ask for a retention." (Tr. 342).

On October 9, 1975, Gulley received a psychiatric evaluation from Dr. Factora. The evaluation noted "In my opinion he should remain here because of his unpredictable behavior. He has poor impulsivity and fear of prison. . . ." (State's Exhibit B at 20). Dr. Factora testified that he based his decision to retain Gulley upon Gulley's fear of prison even though he believed that Gulley was not psychotic. (Tr. 503, A - 81). He stated:

"He mentioned to me that he didn't want to go back to prison. His fear of his life. I felt he was very . . . his behavior is unpredictable, so to maintain a therapeutic relationship, I retained him." (Tr. 496).

On October 17, 1975, Gulley was involved in a fight with patients and correctional officers. (Tr. 50-51, 298, 299, A - 81). After the fight, he was placed on the jail ward and then in a restraining sheet. (Tr. 52, 309, A - 81). On October

20, 1975, less than two weeks after his last psychiatric evaluation;⁷ Gulley received a psychiatric evaluation from six doctors while he was in a restraining sheet.⁸ (Tr. 510, 557, 431, 436). There is no evidence Gulley was told he would be evaluated on October 20, 1975. Gulley testified that the evaluation lasted about three minutes (Tr. 56) and that he was told:

⁷ The testimony of the psychiatrists was totally inconsistent regarding why the evaluation had been scheduled for October 20, 1975. Dr. Factora testified that Gulley was evaluated because the administration scheduled the interview on that day. (Tr. 497) He later stated that he did not know whether Gulley had been on an administration list to be evaluated and an evaluation was conducted because ". . . Gulley was the subject of discussion." (Tr. 507) Dr. Feldman testified that Dr. Sweeney initiated the evaluation, (Tr. 679); that it was not common for six doctors to evaluate a patient; and that it was Dr. Sweeney's methodology. (Tr. 682) Dr. Sweeney testified that he had nothing to do with the decision to have six doctors conduct the evaluation. (Tr. 322) Dr. Cakir testified that Gulley was evaluated on October 20, 1975 because his disruptive behavior on October 17, 1975 brought him to the attention of the doctors. (Tr. 547, 559)

⁸ Dr. Cakir testified that a restraining sheet is normally used when a patient is ". . . quite disturbed, mentally, physically, emotionally . . ." (Tr. 557) Dr. Sweeney testified that when a patient is placed in a restraining sheet "obviously, he needs further treatment, of course." (Tr. 284) Dr. Sirman testified that Gulley had been in the restraining sheet for about eighteen hours prior to the evaluation. (Tr. 431).

"That it was for . . . the purpose of me going back to prison because of the fight that I had been involved in with the officers. The pressure was put on them, on the doctors, from the officers unit." (Tr. 55)

While at the conclusion of the psychiatric evaluation Gulley was found to have recovered from his mental illness, the psychiatric evaluation dated October 20, 1975 indicates as follows:

"The patient was last evaluated on October 9, 1975. Since then his condition seems to be the same except on one occasion he was involved in an unpleasant incident." (State's Exhibit B at 20)

Gulley was transferred to Fishkill on October 21, 1975, and to Auburn on March 15, 1976.

D. Procedures Utilized in Returning Inmates to Prison.

The District Court found and the testimony indicated that inmates are periodically evaluated by psychiatrists who are not necessarily licensed by New York State to practice medicine or psychiatry. It was generally agreed that the periodic evaluation consists of the psychiatrist's interview with the inmate and examination of the patient's file. The evidence indicates that inmates are not evaluated by the same doctor each time. (A - 88)

The testimony indicated that aggressive behavior could cause inmates to be evaluated even though a periodic evaluation had not been scheduled. Dr. Sweeney stated that an altercation could bring an individual to everyone's attention and cause that inmate to be evaluated. (Tr. 372, A - 87). Dr. Feldman noted that patients involved in assaults on correctional personnel were always re-evaluated. (Tr. 681) Dr. Cakir testified that the October 17, 1975 disruption caused Gulley and Cruz to be brought to the medical staff's attention and evaluated. (Tr. 547, 555). Dr. Cakir also stated that Cruz was evaluated on October 20, 1975 because he was becoming a "behavior problem." (Tr. 554). Martin Ogulnick testified that he had been asked to prepare special evaluations on inmates who were more "verbal" and "resistive" than usual. (Tr. 150).

Once an inmate is evaluated, he is not notified at the conclusion of the interview that a decision has been made to return him to prison. (Tr. 37, 91, 209, 324). Once the psychiatrist makes the decision to return the inmate to prison, he has no further contact with the inmate. When Mitchell was informed that he was returning to prison, a major altercation resulted and he was forced to walk to the transfer unit in a strait jacket. (Tr. 474). However, Dr. Factora, the doctor

who recommended Mitchell's return to prison, testified that he had no knowledge of Mitchell's reaction and had no further contact with him prior to his return to prison. (Tr. 525). Furthermore, Dr. Sweeney admitted that there was little continuity in treatment when the inmate was transferred to prison. He stated:

"We have taken the trouble . . . to send along a prescription of how this man should be managed, what progress he requires and so on. You know, you can't make people read things and you can't make them do it either, so that I don't know where the ball gets dropped, but it sure gets dropped a lot."
(Tr. 242)

E. Criteria Utilized in Returning Inmates to Prison.

There are neither written nor oral guidelines used in determining whether an inmate should be returned to prison.⁹ (Tr. 261, 381, 482, A - 87, 91). The psychiatrists generally agreed that a psychotic inmate should be retained at Matteawan. (Tr. 274, 545). However, doctors testified that a non-psychotic inmate might be returned to prison if his behavior brought him to the attention of the doctors. Dr. Cakir testified that a non-psychotic inmate who behaves well might not be noticed while a non-psychotic aggressive patient might be noticed and returned to prison. (Tr. 372, 554).

⁹ Dr. Sweeney testified as follows:

"I don't give them any directions. They're all doctors. They're all qualified. They make up their own minds. It's their patients."
(Tr. 261)

Testimony indicated that an inmate may be noticed and returned to prison if he is involved in fights with correctional officers; if he is involved in litigation against the administration; if he ceases to assist the administration; or if he is difficult to deal with. The following testimony by Dr. Feldman indicates that disruptive conduct involving correctional officers may result in transfer.

"Q: Is it customary to re-evaluate a patient who has been involved in an assault on Correctional personnel?

A: It's not standard procedure. It is one hundred percent." (Tr. 681)

"Q: Has he (Sweeney) ever said to you, 'that this patient causes so much problems with the Correctional officers and they are protesting too much, that I think we would be better off getting him out of here.'?

A: Yes . . ." (Tr. 695).

Dr. Cakir testified he advised Dunleavy that further involvement in litigation could bring him to everyone's attention and might result in his return to prison. (Tr. 569-70). The District Court found that Dr. Sirman stated that inmates who ceased to assist the administration would be returned to prison because "once such a patient ceases to be an aid to the hospital staff the reason for his retention disappears." (A - 88). Finally,

the District Court found that inmates may be returned to prison if they are difficult to deal with. The Court states:

"Dr. Feldman also acknowledged that both Matteawan and the prison medical staffs are susceptible to "passing the buck" as a method of disposing of extraordinarily difficult cases." (A - 91).

In viewing the procedures and criteria used to return inmates to prison, the District Court found that "there appeared to be very little standards or objective guidance for the use of the staff personnel who must make the transfer decision." (A - 91).

ARGUMENT

I. PLAINTIFFS HAVE A RIGHT TO TREATMENT AT MATTEAWAN STATE HOSPITAL PURSUANT TO NEW YORK CORRECTION LAW ARTICLE 16

The District Court correctly decided that mentally ill inmates have a right to treatment under New York law. An analysis of Article 16 of the New York Correction Law¹⁰ reveals that the article authorizes a statutory right to treatment.¹¹ The Article begins with N.Y. Correction Law §400(1) (McKinney 1977, amending McKinney 1968) which provides in pertinent part:

"The department of correction shall maintain one or more hospitals, to be used solely for the purpose of holding in custody and caring for . . . such convicted persons as may be declared mentally ill while undergoing sentence of imprisonment. . . ." (Emphasis supplied)

Mental illness is defined in N.Y. Mental Hygiene Law §1.05(17) (McKinney 1976) as follows:

¹⁰ This Article has been repealed effective April 1, 1977 by L. 1976, c. 766, §1. The new Article 16 sets forth an even more explicit right to treatment for mentally ill inmates at Matteawan. N.Y. Mental Hygiene Law §29.27(d) (McKinney 1977 amending McKinney 1976) provides that "an inmate-patient shall be entitled to the rights to care and treatment set forth in section 15.03 of this chapter. . . ."

¹¹ The New York State Constitution may also authorize a state constitutional right to treatment for mentally ill persons. N.Y. Const. Art. 17 §4 (McKinney 1969) provides as follows:

"The care and treatment of persons suffering from mental disorder or defect and the protection of the mental health of the inhabitants of the state may be provided by state and local authorities and in such manner as the legislature may from time to time determine."

"an affliction with a mental disease or mental condition which is manifested by a disorder or disturbance in behavior, feeling, thinking, or judgment to such an extent that the person afflicted requires care and treatment . . ."
(Emphasis supplied).

N.Y. Correction Law §408 (McKinney 1977, amending McKinney 1968) establishes the procedures for the commitment of mentally ill inmates to Matteawan and authorizes a judge to commit a mentally ill person to Matteawan

". . . upon petition and the affidavit of two examining physicians that the warden or other officer in charge is not able to properly care for such person at the institution where he is confined, and that such person is in need of immediate treatment. (Emphasis supplied).

New York state and federal courts have uniformly construed Article 16 of the New York Correction Law to require that mentally ill persons at Matteawan be provided with treatment. In Kesselbrenner v. Anonymous, 39 A.D. 2d 410, 334 N.Y.S. 2d 738 (2d Dept. 1972), rev'd. on other grounds, 33 N.Y. 2d 161, 350 N.Y.S. 2d 889, 305 N.E. 2d 903 (1973), the Appellate Division¹² held that treatment is mandated by §400(1) and stated as follows:

¹² In analyzing the significance of the Appellate Division's opinion, the court in Dunleavy v. Wilson, 397 F. Supp. 670, 673 n. 13 (S.D.N.Y. 1975) noted that ". . . the construction placed upon a statute by a state's intermediate appellate court which was left undisturbed-though not specifically passed upon-on appeal to the state's highest court is . . . binding on the federal courts. Thorington v. Cash, 494 F. 2d 582, 587 (5th Cir. 1974). . . . This is the situation in the instant case."

"We attach no significance to the omission of the word 'treatment' in the mandate to the Department of Correction (Correction Law §400, subd. 1) to maintain hospitals for the mentally ill 'solely for the purpose of holding in custody and caring for such mentally ill persons'. In our opinion, the word 'care' as used therein includes and imports the 'treatment' of such persons." (Emphasis supplied) 39 A.D. 2d at 417.

In United States ex rel. Schuster v. Harold, 410 F. 2d 1071 (2d Cir.), cert. denied, 396 U.S. 847 (1969), this Court construed N.Y. Correction Law §375,¹³ which was substantially identical to N.Y. Correction Law §400, as mandating a state statutory right to treatment for mentally ill prisoners. This Court stated as follows:

"The statutory scheme thus contemplates that a prisoner will be committed to Dannemora only if he is mentally ill and in need of treatment or special custodial care because of the problems he presents to himself or other prisoners. The legislature appeared to presume that one committed under its provisions would be provided with adequate care or treatment, the need for which justified the commitment." 410 F. 2d at 1087 (Emphasis supplied)

¹³ New York Correction Law §375 authorized the establishment of Dannemora State Hospital for the ". . . purpose of confining and caring for such male prisoners as are declared mentally ill while confined in a state prison." This section was repealed in 1970 pursuant to L. 1970, C. 476 §50, and was replaced by the current N.Y. Correction Law §400.

Two New York District Courts have found that Article 16 of the New York Correction Law affords mentally ill inmates a right to treatment. In Dunleavy v. Wilson, 397 F. Supp. 670 (S.D.N.Y. 1975), Judge Weinfeld held that Article 16 of the New York Correction Law did not violate the Fourteenth and Eighth Amendments by failing to mandate treatment because "[t]he statute does require that treatment be afforded individuals such as plaintiffs." The court reasoned as follows:

"Like the New York Appellate Division, this Court can therefore find no significance in the omission of the word 'treatment' in section 400(1) of Article 16 of the Correction law, which provides for the 'custody and caring for such mentally ill persons.' The statutory interpretation of section 400(1) by the Appellate Division, the framework of Article 16, and the legislature's definition of 'mental illness' thus refute plaintiff's contention that 'treatment' is not mandated by the Correction Law." 397 F. Supp. at 673.

In Negron v. Preiser, 382 F. Supp. 535 (S.D.N.Y. 1974), the court recognized that "Matteawan is a hospital obligated by statute to provide care, including treatment." Negron, supra at 538. The court also noted that inmates are "sent to Matteawan for treatment or a type of custody which is unavailable elsewhere in the state correction system. Negron, supra at 538.

It is significant to note that in Negron and Dunleavy, defendants admitted and indeed argued that Matteawan was a "treatment institution" Negron, supra at 538. In a New York State Department of Correction publication entitled "Administration and Treatment of the Criminal Insane" (1953) it is noted at 9 that Matteawan was created because "Prisons furnished custodial care but lacked facilities for mental treatment." The treatment program is described at 10 as an attempt "to restore patients to normal mental condition." It is also noted at 18 that "It is important that the institutional personnel understand basic psychiatric concepts so that they may aid the institution's treatment program." It is clear that the purpose of Matteawan is to treat mentally ill inmates.

Plaintiffs contend that this statutory intent and purpose provides them with a statutory right to remain at Matteawan until their treatment is completed. While inmates may be transferred from one prison to another, the commissioner of correction has no authority to arbitrarily transfer inmates from prisons to hospitals and from hospitals back to prisons. Inmates may be transferred from prison to hospitals only if they are judicially determined to be mentally ill pursuant to N.Y. Correction Law

§408.¹⁴ Once inmates are hospitalized, the commissioner may "transfer inmates from one state hospital for the mentally ill to another." N.Y. Correction Law §401 (McKinney 1977). Inmates may be returned to prison when they have "recovered" pursuant to N.Y. Correction Law §410 (McKinney 1968). The statutes do not permit a return for punitive or other reasons.

While defendants suggest that plaintiffs may be returned to prison at will because psychiatric treatment is available in all state correctional facilities (Appellants' Brief at 14), the evidence establishes that plaintiffs did not receive psychiatric treatment at the state correctional facilities (A - 72, 43, 93-4)¹⁵ and that minimal psychiatric treatment is not available at the correctional institutions.¹⁶

¹⁴ In Liles v. Ward, 76-4786 (S.D.N.Y. Nov. 12, 1976), seven women inmates challenged their transfer from Bedford Hills Correctional Facility to Matteawan without a judicial hearing. Judge Frankel ordered defendants to "cease forthwith confining plaintiffs in Matteawan State Hospital and refrain from committing them to that place unless and until a judicial hearing has been held, resulting in findings requisite for any such commitment."

¹⁵ Dr. Factora admitted that inmates returned to prison "would not be on medication at all or. . . would be on much reduced dosage of medication because of the different medical attention available at the prisons." (Tr. 514)

¹⁶ By these arguments, plaintiffs do not concede that adequate psychiatric treatment is available at Matteawan. Plaintiffs concur with the numerous judicial expressions to the effect that ". . . the quality of treatment provided (at Matteawan) is substantially inferior to that provided in civil hospitals. . ." Negron v. Preiser, 382 F. Supp. 535, 538. (S.D.N.Y. 1974); See Gomez v. Miller, 341

Dr. Jack Wright's testimony indicates that there are effectively about eleven full time psychiatrists available to approximately 17,000 state prisoners. (Tr. 642-44; 581). Dr. Sweeney testified that there were seven full time psychiatrists at Matteawan to treat a population of 310 patients. (Tr. 227). These statistics indicate that a patient at Matteawan has thirty times the opportunity to see a psychiatrist as does a prisoner in a state correctional facility. In Negron v. Preiser, 382 F. Supp. 535, 541 (S.D.N.Y. 1974), Judge Ward noted that Matteawan was "understaffed for the provision of intensive psychiatric care." Accordingly, the state correctional facilities provide extremely minimal psychiatric treatment of prisoners. Plaintiffs have a statutory right to treatment at Matteawan.

II. PLAINTIFFS MAY NOT BE TRANSFERRED FROM MATTEAWAN TO PRISON WITHOUT PROCEDURAL DUE PROCESS PROTECTIONS.

A. Introduction

The District Court correctly decided that the state created right to treatment may not be terminated in the absence of procedural due process protections. In Wolff v. McDonnell, 418 U.S. 539, 558 (1974) the Supreme Court recognized that "...

¹⁶ (cont.) F. Supp. 323 (S.D.N.Y. 1972), aff'd., 412 U.S. 914 (1973). Nevertheless, because of their status as New York prisoners, if plaintiffs receive any treatment whatever, such treatment will be received only at Matteawan.

a person's liberty is equally protected, even when the liberty itself is a statutory creation of the state." While in Meachum v. Fano, 96 S. Ct. 2532 (1976), the Supreme Court held that inmates could be transferred between prisons without a hearing where state law conferred no right to remain in a particular prison, the Court reaffirmed that state created liberty interests may not be arbitrarily terminated. The Court noted that:

"The liberty interest protected in Wolff had its roots in state law, and the minimum procedures appropriated under the circumstances were held required by the Due Process Clause to insure that the state-created right is not arbitrarily abrogated."
96 S. Ct. at 2539.

See Rodriguez v. Cardwell, No. 75-3338 (9th Cir. Jan. 17, 1977);
The Supreme Court, 1975 Term, 90 Harv. L. Rev. 56, 86-104 (1976).¹⁷
Plaintiffs contend that before a statutory right to treatment is terminated and before transfers are conducted between hospitals and prisons, due process must attach.

¹⁷ In the transfer context, the District Court in Wakinekoha v. Doi, 20 Cr. L. 2090 (10-27-76) (D.C. Haw. Oct. 1, 1976) recently held that a state prisoner facing transfer to a mainland facility was denied due process because the hearing board was not impartial. The court held that "Meachum is not on point because it does not involve a state-created right. . . . The right to a hearing before a fair and impartial board, created by the State of Hawaii, is a liberty interest protected by the Due Process Clause of the Fourteenth Amendment."

B. Plaintiffs' Statutory Right to Treatment May Not be Terminated in the Absence of Due Process Protections.

Plaintiffs contend that the existence of a statutory right to treatment in a hospital and a statutory right to remain at Matteawan until their treatment is completed distinguishes this case from Meachum, supra, where the Court found that "... transfers between Massachusetts prisons are not conditioned upon the occurrence of specified events." Meachum, supra, at 2539.¹⁸ See Lombardo v. Meachum, No. 76-1265 (1st Cir. Jan. 20, 1977). Where transfer is conditioned upon a specific event, i.e. "recovery" pursuant to N.Y. Correction Law §410, due process must attach to properly determine whether this event has occurred.

Several district courts have concluded that a state created right to treatment may not be terminated in the absence of procedural due process protections. In Burchett v. Bower, 355 F. Supp. 1278 (D. Ariz. 1973), the court found a statutory right to treatment in an Arizona statute which provided as follows:

¹⁸ One commentator has interpreted Meachum as follows:

"The Court found that since Massachusetts' statutes provide no standards governing transfers of prisoners, the inmates had not been deprived of any constitutionally recognized interest."

The Supreme Court, 1975 Term, 90 Harv. L. Rev. 56, 89 (1976).

"If the prisoner is determined to be mentally ill, the court shall order and direct that he be confined in the Arizona state hospital in the legal custody of the superintendant of the prison." A.R.S. §31-224(c) 355 F. Supp. at 1280 fn. 1.

The Arizona statutory scheme also provided that ". . . when it appears that the prisoner has sufficiently recovered that he may be returned to the prison without further risk, he shall be returned to serve the unexpired term." A.R.S. §31-224(D)¹⁹ Burchett, supra, at 1280 fn. 1. The Court noted that:

". . . by enacting A.R.S. §31-224 and by committing Burchett from the Prison to the Hospital pursuant to its terms, the State of Arizona has both determined that he is in need of medical treatment and has undertaken the corresponding responsibility to provide it. 355 F. Supp. at 1281.

The Court decided that this right to treatment ". . . falls within the category of rights requiring a hearing before that benefit is terminated and the patient returned to the Prison or transferred elsewhere. See Goldberg v. Kelly, 397 U.S. 254, 90 S. Ct. 1011, 25 L. Ed. 2d 287 (1970)" Burchett, supra at 1281.

¹⁹ N.Y. Correction Law §410 which provides that inmates shall be returned to prison when they have "recovered" arguably confers an even broader right to treatment than that found in the Arizona statute.

In Romero v. Schauer, 386 F. Supp. 851 (D. Colo. 1974) criminal patients of a state mental hospital challenged their transfer to a state prison after an administrative determination that they were too dangerous for continued confinement at the hospital.²⁰ The court first noted at 860 that the patients had a state statutory right to treatment. The court then held that due process must protect the decision to transfer patients to prison in part because the return to prison would decrease the psychiatric treatment provided to the patients. Romero, supra, at 855. The District Court here correctly decided that due process attaches to the transfer of inmates to prison because the state right to treatment may not be "arbitrarily abrogated." (A - 101).

C. Plaintiffs May Not Be Transferred From a Mental Hospital to Prison in the Absence of Due Process Protections.

Courts have consistently recognized that transfers between mental hospitals and prisons are qualitatively different from transfers between prisons. Due process protections have attached to transfers between mental hospitals and prisons because

²⁰ The Colorado statute in question, C.R.S. (1963), §71-2-4(3) provided that a patient could be transferred to prison if he was "so dangerous that he cannot be safely confined in any such institution for the care and treatment of the mentally ill . . ." New York has no equivalent statute.

of the functional differences in conditions, and the collateral consequences of the change.²¹ In Baxstrom v. Herold, 383 U.S. 107 (1966) the Supreme Court stated that

"While we may assume that transfer among like mental hospitals is a purely administrative function, where as here, the State has created functionally distinct institutions, classification of patients for involuntary commitment to one of these institutions may not be wholly arbitrary." 383 U.S. at 114.

The New York Court of Appeals noted in People ex rel. Brown v. Johnston, 9 N.Y. 2d 482, 215 N.Y.S. 2d 44, 174 N.E. 2d 725 (1961) that:

"Although under ordinary circumstances a mere transfer . . . is purely an administrative matter, and a person has no standing to choose the place in which he is to be confined, we do not feel that the courts should sanction, without question, removals, in cases of alleged insane prisoners, which can conceivably be uncontrolled and arbitrary." 9 N.Y. 2d at 484.

In Matthews v. Hardy, 420 F. 2d 607, (D.C. Cir. 1969) Cert. denied 397 U.S. 1010 (1970) the court held that inmates were entitled to notice, counsel, cross-examination, and a jury trial prior to their transfer from prison to mental hospital and noted that:

²¹ One commentator has stated that:

"As long as a substantial deprivation of liberty is involved in involuntary transfers of mentally ill prisoners, the due process guarantees will require extensive procedural protections to prevent unjustified transfers."

Commitment and Release Standards and Procedures: Uniform Treatment for the Mentally Ill, 41 U. Chic. L. Rev. 825, 839 (1974).

"We think the differences in the two types of incarceration are simply too great to treat transfer to a mental hospital as a routine administrative procedure. The consequences of a mistake are sufficiently great. . ."
420 F. 2d at 611

This Court recognized in United States ex rel. Schuster v. Herold, 410 F. 2d 1071, 1080 (2d Cir. 1969) that "we would delude ourselves if we believed that a prisoner's transfer to a prison maintained for the criminally insane is a mere administrative matter."

Courts have uniformly limited the doctrine of Meachum to prison transfer cases and rejected any extension to mental hospital transfer situations. In Sites v. McKenzie, 20 Cr. L. 2256 (D.C.N.W.Va. Nov. 12, 1976) where an inmate challenged his transfer from prison to a mental institution, the court rejected the argument that Meachum v. Fano and Montayne v. Haymes permitted the transfer in the absence of due process. The court noted:

"Yet a transfer from a state prison to a state mental hospital is substantially different from a transfer from one state prison to another. The grievous loss to a prisoner involved in a transfer to the mental hospital is not merely 'any grievous loss,' as the Meachum Court described deprivations involved in interstate prison transfers. Rather it is sufficiently onerous to require the imposition of procedural protections."

In Liles v. Ward, No. 76 Civ. 4786 (S.D.N.Y. Nov. 12, 1976) the court rejected defendants' contention that Meachum precluded a hearing where inmates were transferred from a prison to a hospital. Plaintiffs contend that transfers between mental hospitals and prisons require due process protections.

III. PLAINTIFFS' CONSTITUTIONAL RIGHT TO TREATMENT MAY NOT BE TERMINATED IN THE ABSENCE OF DUE PROCESS PROTECTIONS.

If this Court determines that plaintiffs have no statutory right to treatment, plaintiffs contend that their constitutional right to treatment may not be terminated in the absence of procedural due process protections. While the Supreme Court has not ruled on an inmates' constitutional right to treatment, the Court has recognized that persons may not be constitutionally punished for the mere status of being mentally ill.

Robinson v. State of California, 370 U.S. 660, 666 (1962). If treatment as opposed to status is the justification for commitment, due process requires that the treatment be adequate. In Jackson v. Indiana, 406 U.S. 715, 738 the Court stated that "due process requires that the nature and duration of commitment bear some reasonable relation to the purpose for which the individual is committed." Plaintiffs contend that incarceration at Matteawan can only be justified if there is a right to receive treatment at the institution. See generally, Wyatt v. Aderholt, 503 F. 2d

1305 (5th Cir. 1974); Rouse v. Cameron, 373 F. 2d 451 (D.C. Cir. 1967). Deliberate indifference to psychiatric treatment is as great a constitutional violation as deliberate indifference to serious medical needs. See Estelle v. Gamble, 97 S. Ct. 285 (1976).

While this Court did not reach the issue of a constitutional right to treatment in United States ex rel. Schuster v. Herold, 410 F. 2d 1071 (2d Cir. 1969) it was noted that the existence of a conviction may not be an adequate basis for denying a mentally ill inmate the right to treatment. "The incidence of having been convicted of a crime surely does not deprive a person of all constitutional protections for the duration of his sentence." United States ex rel. Schuster, supra at 1088. Plaintiffs maintain that these protections include the right to procedural due process before their constitutional right to treatment is terminated.

IV. PLAINTIFFS MAY NOT BE TRANSFERRED FROM MATTEAWAN TO PRISON SEGREGATION AS A PUNITIVE MEASURE WITHOUT PROCEDURAL DUE PROCESS PROTECTIONS.

Plaintiffs contend that they may not be transferred from Matteawan to prison as a punitive measure and placed in segregation in the absence of procedural due process protections.²² The evidence clearly indicates that the transfers were effected as a punitive measure. The District Court found that:

²² Aggressive behavior alone in the absence of recovery from mental illness is not sufficient justification for a return to prison. As noted in the National Advisory Commission on Criminal Justice Standards and Goals: Report on Corrections at 376 (1973), "... a large proportion of highly disturbed offenders were prone to violent and destructive behavior and highly oriented to escape"

"The timing and context of the several pre-transfer evaluations done on the other plaintiffs make it very likely that the results -- a decision to transfer -- were foregone conclusions in light of the plaintiffs' prior problems with correctional officers."
(A - 99)

The Court also noted that

"When a prison inmate continually assaults correction officers and other prisoners, the prison officials have little difficulty in convincing the two certifying doctors that he is incompetent and in need of hospitalization. If he continues such behavior at Matteawan his status is reviewed and his acts are viewed as either a sign of recovery, or at least not a psychotic symptom preventing his return to prison. He gets sent back to prison and the roundelay continues."
(A - 92)

The evidence also indicates plaintiffs returned to prison were placed in strip cells and segregation. (Tr. 72, 42-43, 477)
Given the punitive nature of the transfer and the concomitant placement in segregation, due process much attach.

In Wolff v. McDonnell, 418 U.S. 539, 571 n. 19 (1974), the Supreme Court noted that due process protections must be afforded to inmates when there is a "major change in the conditions of confinement." Recent Supreme Court prison transfer cases did not consider the requirements of due process when an inmate is transferred and placed in segregation. In Montayne v. Haymes,

96 S. Ct. 2543, 2545 (1976) the Court stated that "No loss of good time, segregated confinement, loss of privileges, or other disciplinary measures accompanied the transfer." In Meachum v. Fano, 96 S. Ct. 2532, 2537 (1976) the Court indicated that "No respondent was subjected to disciplinary punishment upon arrival at the transfer prison. None of the transfers ordered entailed loss of good time, or disciplinary confinement." The requirements of Wolff remain applicable when transfers entail disciplinary confinement.

Plaintiffs contend that procedural protections must attach when transfer is accompanied by placement in strip cells and segregation. As placement in strip cells and segregation constitutes disciplinary confinement and not simply a loss of privileges, due process is required. See Cunningham v. Ward, No. 76-2068, slip. op. at 734, (2d Cir. Dec. 1, 1976); Mawhinney v. Henderson, 542 F. 2d 1, 4 (2d Cir. 1976); Crooks v. Warne, 516 F. 2d 837 (2d Cir. 1976); United States ex rel. Larkins v. Oswald, 510 F. 2d 583 (2d Cir. 1975). Even if the placement of plaintiffs in segregation is considered to be protective segregation, or administrative segregation, due process protections are appropriate. See Bloeth v. Montayne, 514 F. 2d 1192 (2d Cir. 1975); See Rodriguez v. Gardwell, No. 75-3338, (9th Cir. Jan. 17, 1977).

Procedural due process protections have been imposed when inmates are transferred to more restrictive hospital wards. See, Brown v. Schubert, 389 F. Supp. 281 (E.D. Wis. 1975); Jones v. Robinson, 440 F. 2d 249 (D.C. Cir. 1971). See generally Demps v. Wainwright, 522 F. 2d 192 (5th Cir. 1975). Due process is even more appropriate here given the loss of treatment opportunities and subsequent injury.

V. THE DISTRICT COURT IDENTIFIED APPROPRIATE MINIMUM PROCEDURES FOR THE TRANSFER OF INMATES FROM MATTEAWAN TO PRISON.

The District Court found that there "has been absolutely no showing of any procedural safeguards whatever antecedent to the terminations of treatment." (A - 99) The Court ordered the defendants to construct an administrative process²³ for the return of inmates to prison. That would include at a minimum:

"written notification to the inmate of the transfer decision and its factual basis; identification of the decision-makers; ending the use of the treatment staff as the sole decision-makers; and some type of professional review which will be free from administrative pressures." (A - 103).

²³ The requirement that defendants construct a uniform process is essential to sound decisionmaking. In National Advisory Commission on Criminal Justice Standards and Goals: Report on Corrections (1973) it is stated that correctional agencies should provide for the psychiatric treatment of emotionally disturbed offenders. The Report recommends at 374 that:

"Program policies and procedures should be clearly defined and specified in a plan outlining a continuum of diagnosis, treatment, and aftercare."

The Court based its due process standards in the following factual findings:

- 1) There are few "standards or objective guidance for the use of the staff personnel who must make transfer decisions." (A - 91);
- 2) Doctors differed "as to the possibility and propriety of Matteawan treating neurotic or personality disorders." (A - 91);
- 3) The requirement that treating physicians make the transfer decision "leads to abuses by both the treating physician and the patient; either may seek to disguise a recovery or certify one that does not exist for any one of a number of ulterior purposes." (A - 100);
- 4) "[D]ifferent physicians may have radically different views of both a given inmate's illness and the need for and possibility of treatment of any given mental illness." (A - 101).

The requirements of due process depend upon an "appropriate accommodation of the competing interests involved." Goss v. Lopez, 95 S. Ct. 729, 738-39 (1975).²⁴ The inmate's and administration's interests are served by requiring that written notice of the transfer decision and its factual basis be provided to the

²⁴ One commentator has noted that the procedures required by due process are determined by balancing:

"the severity of loss which the individual suffers as a result of governmental deprivation of a protected liberty or property interest, the weight of governmental interests justifying summary actions and the functional appropriateness of the requested procedures for resolving the particular type of dispute in question."

Note, Specifying the Procedures Required by Due Process: Towards Limits on the Use of Interest Balancing, 88 Harv. L. Rev. 1510, 1514 (1975)

inmate.²⁵ As noted in parole release cases "[t]he requirement of a statement of reasons and facts should serve to protect the inmate from arbitrary decisions, or those based on impermissible grounds." Zurak v. Regan, No. 76-2100, slip. op. at 1730 (2d Cir. Feb. 7, 1977). See Haymes v. Regan, 525 F. 2d 540, 544 (2d Cir. 1975); United States ex rel. Johnson v. Chairman, New York State Board of Parole, 500 F. 2d 925, 929 (2d Cir.), vacated and remanded as moot sub. nom. Regan v. Johnson, 419 U.S. 1015 (1974).

The requirement that treatment staff not function as the sole decisionmakers and that professional review be free from administrative pressures is essential so that review of the decision to return the inmate to prison is not made by the initial decisionmaker. See Withrow v. Larkin, 95 S. Ct. 1456, 1470 n. 25 (1975). Review of this decision is necessary because as noted in Morrissey v. Brewer, 408 U.S. 471, 486 (1976)

"The officer directly involved in making recommendations cannot always have complete objectivity in evaluating them. Goldberg v. Kelly found it unnecessary to impugn the motives of the caseworker to find a need for an independent decisionmaker to examine the initial decision."

²⁵ Judge Friendly has noted that "It is likewise fundamental that notice be given and that it be timely and clearly inform the individual of the proposed action and the grounds for it." Friendly, Some Kind of Hearing, 123 U. Pa. L. Rev. 1267, 1280 (1975).

See Gagnon v. Scarpelli, 411 U.S. 778, 785-86 (1973).

Review of the treatment staffs' decisions is also needed in view of the District Court's factual finding that doctors differ regarding a given inmate's illness, need for treatment, and criteria as to who should be treated at Matteawan. "[P]rocedural due process rules are shaped by the risk of error inherent in the truthfinding process." Matthews v. Eldridge, 96 S. Ct. 893, 907 (1976) Where the risk of error is high, given the disparity in possible diagnosis, independent professional review of decisions is warranted.

Plaintiffs contend that minimum due process may also require the assistance of counsel. In Wolff v. McDonnell, 418 U.S. 539, 570 (1974) the court noted that inmates would be entitled to some assistance,

"Where an illiterate inmate is involved, however, or where the complexity of the issue makes it unlikely that the inmate will be able to collect and present the evidence necessary for an adequate comprehension of the case . . ."

The assistance of counsel is required here because of the complexity of the issues involved and the inmates' need for assistance in the presentation of evidence. In Rhem v. Malcolm, 371 F. Supp. 594, 632 (E.D.N.Y. 1974), the court stated that counsel substitutes must be allowed in disciplinary proceedings when "the detainee appears incapable of speaking effectively for himself."

In Romero v. Schauer, 386 F. Supp. 851, 858-59 (D. Colo. 1974), the court held that "The factual situation in this case is sufficiently different from Wolff, however, that due process requires that the patient be allowed to retain legal counsel, if financially able, or if he is indigent, he should be provided with counsel." The court noted that "One who has been adjudicated insane cannot be presumed competent to grapple with the complex issue of his 'dangerousness' involving as it must, questions of fact and psychiatric prediction. The presumption must be to the contrary."

Appellants do not contend that the minimum standards set forth by the District Court will defeat or impair the states' interests in providing treatment at Matteawan or insuring security. Appellants contend that the procedures mandated by the District Court are not necessary because New York State's resources are limited and the hospital facilities are limited. (Appellants' Brief at 19) The lack of resources is not an appropriate justification for inadequate procedural protections. In Rhem v. Malcolm, 527 F. 2d 1041, 1043-44 (2d Cir. 1975), this Court noted that "... an individual's constitutional rights may not be sacrificed on the ground that the city has other and more pressing priorities." In Wyatt v. Aderholt, 503 F. 2d 1305, 1315 (5th Cir. 1974), the court stated that a state legislature may not "provide a social service in a manner which

will result in the denial of individuals' constitutional rights." See also Williams v. Robinson, 432 F. 2d 637, 641 (D.C. Cir. 1970); Doe v. General Hospital, 434 F. 2d 427, 433 (D.C. Cir. 1970); Rouse v. Cameron, 373 F. 2d 451, 457 (D.C. Cir. 1967).

The procedural due process protections set forth by the District Court will help to insure that transfer decisions are more reliable.²⁶ As Judge Bazelon has noted

"What they [courts] can do is ensure that such judgments are in fact made, and made rationally on an individualized basis and recorded for future reference and scrutiny. This requires that professionals be held accountable for their decisions and be required to present facts, and conclusions drawn rationally from those facts, in order to justify treatment decisions." Bazelon, Institutionalization, Deinstitutionalization and the Adversary Process, 75 Col. L. Rev. 897, 904 (1975).

Rational decision making is in the interests of plaintiffs and defendants.

VI. PLAINTIFFS' RIGHT TO TREATMENT MAY NOT BE TERMINATED IN RETALIATION AGAINST THE EXERCISE OF FIRST AMENDMENT RIGHTS.

The evidence indicates that inmates may be returned to prison if they engage in litigation against the administration or are active in inmate organizations. Dr. Cakir testified that he

²⁶ "Imposing procedural protections whenever the state has in fact created a relationship of dependency and reliance does not impinge on the responsibilities of a state. To the contrary, it encourages a state to live up to them." The Supreme Court, 1975 Term, 90 Harv. L. Rev. 56, 104 (1976).

advised Dunleavy that if he continued to be involved in litigation he might be returned to prison. (Tr. 570) In an affidavit filed in opposition to the motion to stay, George Mitchell stated that he was Chairperson of the Inmate Grievance Committee and Chairman of the Inmate Liason Committee. He indicated that Dr. Maciejewski stated to him as follows:

"other officials at Matteawan were pressuring him to certify that I had recovered from my mental illness and should no longer remain at Matteawan. He indicated that these officials felt that I was becoming too active in inmate committees and too outspoken regarding conditions at Matteawan."

Affidavits filed by Charles Trongone, Robert Ruddock, and James Wright allege that the inmates are being returned to prison because of their activities with the Inmate Liason Committee.

Plaintiffs contend that if this Court determines that they have no right to treatment, this matter should be remanded to the District Court for further testimony regarding violations of First Amendment rights. See Haymes v. Montayne, No. 74-1208 (2d Cir. Dec. 28, 1976).

VII. THE DISTRICT COURT CORRECTLY DECIDED TO RULE ON THE ISSUES IN THIS CASE AND NOT TO ABSTAIN

While the appellants never requested that the District Court abstain from deciding the issues in this case, they now suggest in a footnote that abstention is appropriate. (Appellants' Brief at 14 n.2) Abstention is not appropriate as Article 16 of the

New York Correction Law was enacted in 1929, has been construed by state courts, and is not ambiguous. Courts have consistently found that the Article requires that treatment occur at Matteawan. See cases cited pp. 20 to 23. See Wisconsin v. Constantineau, 400 U.S. 433 (1971). The federal constitutional questions may not be avoided. See Procunier v. Martinez, 416 U.S. 396, 404 (1974). Finally abstention should not be invoked in light of the irreparable injury that will occur if this case is not promptly resolved. Zwickler v. Koota, 389 U.S. 241, 252 (1967).²⁷

VIII. THE DISTRICT COURT DECISION IS NOT APPEALABLE

If this Court does not grant appellants' motion to hear this case as an interlocutory appeal pursuant to 28 U.S.C. 1292(b), the appeal should be dismissed as the District Court decision is not appealable. The District Court decision of December 17, 1976 finds liability and directs the appellants to assist in the formulation of a final decree. As the decision does not require the appellants to cease unlawful transfers of inmates, it is not appealable. See Arthur v. Nyquist, No. 76-7292 (2d Cir.

²⁷ Bellotti v. Baird, 96 S. Ct. 2857, 2864 n. 10 (1976), it is noted that:

"The practice of abstention is equitable in nature, see Railroad Comm'n. v. Pullman Co., 312 U.S. 496, 500-501, 61 S. Ct. 643, 645, 85 L. Ed. 971, 974-975 (1941), and it would not be improper to consider the effect of delay caused by the State's failure to suggest or seek a constitutional interpretation, cf. Baggett v. Bullitt, 377 U.S. 360, 379, 84 S. Ct. 1316, 1326, 12 L. Ed. 2d 377, 389 (1964).

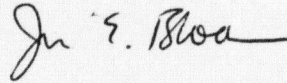
Nov. 8, 1976); Hart v. Community School Board of Brooklyn, 497
F. 2d 1027, 1030-31 (2d Cir. 1974).

CONCLUSION

For the above-stated reasons, the opinion and order
of the District Court should be affirmed.

DATED: Poughkeepsie, New York
February 22, 1977

Respectfully submitted,



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UNITED STATE COURT OF APPEALS
FOR THE SECOND CIRCUIT

HECTOR CRUZ, et al.,

Plaintiffs-Appellees,

-against-

BENJAMIN WARD,

Defendants-Appellants.

AFFIDAVIT OF SERVICE

STATE OF NEW YORK)
COUNTY OF DUTCHESS) ss.:

BARBARA PARMENTER, being duly sworn, deposes and says:

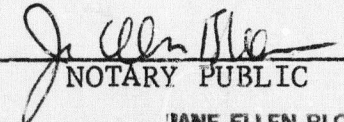
I am not a party to the action, am over 18 years of age and reside at 205 West Main Street, Wappingers Falls, New York, 12590. On February 19, 1977 I served two true copies of the annexed Brief of Plaintiffs-Appellees by mailing the same in a sealed envelope, with postage prepaid thereon in an official depository of the U.S. Postal Service within the State of New York, addressed to the last known address of the addressee as indicated below:

Arlene Silverman, Esq.
Assistant Attorney General
Two World Trade Center
New York, New York 10047

Sworn to before me on

February 19, 1977


BARBARA PARMENTER


NOTARY PUBLIC

JANE ELLEN BLOOM
NOTARY PUBLIC, STATE OF NEW YORK
QUALIFIED IN DUTCHESS COUNTY
COMMISSION EXPIRES MARCH 30, 1978